

Washington Law Review

Volume 63 | Number 4

10-1-1988

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Recommended Citation

Deborah A. Dwyer, Note, *Expert Testimony on Rape Trauma Syndrome: An Argument for Limited Admissibility—State v. Black*, 109 Wash. 2d 336, 745 P.2d 12 (1987), 63 Wash. L. Rev. 1063 (1988).

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EXPERT TESTIMONY ON RAPE TRAUMA SYNDROME: AN ARGUMENT FOR LIMITED ADMISSIBILITY—*State v. Black*, 109 Wash. 2d 336, 745 P.2d 12 (1987).

In *State v. Black*,¹ the Washington Supreme Court faced the question of whether the State, in a rape case, should be allowed to offer expert testimony on rape trauma syndrome (“RTS”).² After examining some of the relevant scientific literature, case law, and the standards governing the admissibility of expert testimony, the court held that expert testimony on RTS was inadmissible. The court based its decision on findings that RTS testimony lacks scientific reliability, and that it unfairly prejudices a defendant accused of rape.

The court’s holding in *Black* was based on a misinterpretation of the available scientific literature, and on the erroneous belief that expert testimony on RTS is always unfairly prejudicial to the defendant. The court’s standard for determining the reliability of scientific evidence is acceptance of a theory within the relevant scientific community. The inaccurate assessment in *Black* of the scientific reliability of RTS indicates that the court did not adhere to the standard in this case. Research conducted on RTS since the original description of the syndrome in 1974 confirms that RTS is a medically recognized reaction to extreme stress. The psychiatric profession recognizes rape as a cause of a serious anxiety disorder. Most courts that have addressed the issue admit expert testimony on RTS. In analogous contexts, the Washington Supreme Court itself has recognized that expert testimony can explain behavior that is beyond the experience of the average juror.

The court does not need to exclude RTS testimony altogether. Where this testimony is directly relevant to the facts of a rape case, it can assist the jury in deciding the issue of consent, while at the same time avoiding unfair prejudice to the defendant. The court could minimize the possibility of unfair prejudice to the defendant in rape cases by limiting the expert’s testimony so that it does not comment directly on the credibility of the alleged victim. As additional protection for the defendant, the court could implement procedural safeguards that ensure the testimony’s probative value. Finally, the court could instruct the jury on the proper weight to be given to expert testimony.

1. 109 Wash. 2d 336, 745 P.2d 12 (1987).

2. Rape trauma syndrome is the stress response pattern of the victim following forced, non-consenting sexual activity. Burgess, *Rape Trauma Syndrome*, 1 BEHAV. SCI. & L. 97 (1983). The state offers the testimony on behalf of the victim, usually after the defendant has claimed that the victim consented to sexual relations.

I. BACKGROUND

A. *Scientific Recognition of Rape Trauma Syndrome*

1. *The Original Study*

The first researchers to describe RTS, Ann Wolbert Burgess and Lynda Lytle Holmstrom, found it to be an acute stress reaction to a life-threatening situation.³ The syndrome usually includes two phases. In the first phase, the victim experiences disorganization in lifestyle. Emotional reactions range from fear, humiliation, and embarrassment to anger and a desire for revenge. Although fear of physical violence and death dominates the victim's feelings, self-blame is also very prominent.⁴ During this phase, when the victim feels the impact of the rape most severely, she may exhibit one of two widely divergent emotional styles. In the expressed style, feelings of fear, anger, and anxiety are manifested through crying, sobbing, smiling, restlessness, and tenseness. In the controlled style, feelings are masked by a calm, composed, or subdued demeanor.⁵

The second phase involves a long-term process of physical and emotional reorganization. This phase often begins about two to three weeks after the attack. Symptoms may include change in residence, travel to sources of support in other cities, nightmares, and various phobic reactions.⁶ Although all victims do not experience the same symptoms in the same sequence,⁷ victims consistently experience the disorganization phase. Many victims thereafter experience mild to moderate symptoms in the reorganization process. Few victims report no symptoms.⁸

3. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974). The description of RTS in this section is taken from this study, which was based on analysis of the symptoms exhibited by 92 adult female victims of forcible rape. These subjects were selected from a total of 146 patients admitted during a one-year period (July 20, 1972 through July 19, 1973) to the emergency ward of Boston City Hospital with a complaint of rape. *Id.* at 981.

4. A rape victim commonly feels that she should have handled the situation differently, regardless of the appropriateness of her actual response. Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408, 410 (1976).

5. The "controlled" reaction to rape was noted in an earlier study as well. Sutherland & Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503, 507-08 (1970).

6. These reactions include fear of indoors or outdoors (depending on where the rape occurred), fear of being alone, fear of crowds, and sexual fears. Burgess & Holmstrom, *supra* note 3, at 984.

7. Various factors affect coping behavior, including ego strength, social network support, and the way the woman is treated as a victim. *Id.* at 983.

8. *Id.*; see also Kilpatrick, Veronen & Best, *Factors Predicting Psychological Distress Among Rape Victims*, in TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC

2. Subsequent Research on Rape Trauma Syndrome

Several researchers have criticized the methods employed in both the Burgess and Holmstrom study and some of the early studies that followed.⁹ Recognizing these shortcomings, more recent studies addressed the problems of the earlier work with carefully designed sampling strategies and more rigorous study methodologies. Most of these recent studies assessed control groups of non-raped women, along with the experimental groups of raped women.¹⁰ These studies employed standardized, objective psychological tests.¹¹ Results uniformly indicated higher levels of fear, anxiety, and depression among victims of sexual assault than among non-victims.¹² Several of these studies also documented long-term reactions to rape, some persisting up to several years after the rape.¹³ These studies have both confirmed and extended the results of the original Burgess and Holmstrom study.

STRESS DISORDER 113, 137 (C. Figley ed. 1985) (assessment of rape victims shortly after the assault documented the fact that the nondistressed victim is the exception rather than the rule).

9. See, e.g., Kilpatrick, Veronen & Resick, *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658, 658-59 (1979); Ruch & Leon, *Type of Sexual Assault Trauma: A Multidimensional Analysis of a Short-term Panel*, 8 VICTIMOLOGY 237, 238-39 (1983). These studies criticized earlier studies for such methodological shortcomings as: Unrepresentative, inadequate, or biased samples; lack of long-term assessment of victims; failure to use standardized, reliable instruments for measuring responses to rape; inadequate description of crucially important aspects of research methodology; and lack of an appropriate comparison group of women who were not raped (a "control" group).

10. See, e.g., Becker, Skinner & Abel, *Sequelae of Sexual Assault: The Survivor's Perspective*, in THE SEXUAL AGGRESSOR: CURRENT PERSPECTIVES ON TREATMENT 240, 244-46 (1983); Ellis, *A Review of Empirical Rape Research: Victim Reactions and Response to Treatment*, 3 CLINICAL PSYCHOLOGY REV. 473, 474-75 (1983); Kilpatrick, Resick & Veronen, *Effects of a Rape Experience: A Longitudinal Study*, 37 J. SOC. ISSUES 105, 112 (1981); Resick, Calhoun, Atkeson & Ellis, *Social Adjustment in Victims of Sexual Assault*, 49 J. CONSULTING & CLINICAL PSYCHOLOGY 705, 706 (1981); Veronen, Kilpatrick & Resick, *Treating Fear and Anxiety in Rape Victims: Implications for the Criminal Justice System*, in PERSPECTIVES ON VICTIMOLOGY 148, 151 (W. Parsonage ed. 1979). Most researchers took care to select the control groups from among women whose race, age, and economic status matched those of the victims. Most selected women from the same neighborhood as the victims to provide some control for other social class, environmental, and cultural variables.

11. See, e.g., Ellis, *supra* note 10, at 477; Frank, Turner & Stewart, *Initial Response to Rape: The Impact of Factors Within the Rape Situation*, 2 J. BEHAV. ASSESSMENT 39, 44 (1980); Kilpatrick, Resick & Veronen, *supra* note 10, at 113; Kilpatrick, Veronen & Resick, *supra* note 9, at 660-61.

12. See, e.g., Becker, Skinner & Abel, *supra* note 10, at 249, 253; Ellis, *supra* note 10, at 477; Kilpatrick, Resick & Veronen, *supra* note 10, at 111; Kilpatrick, Veronen & Best, *supra* note 8, at 114; Kilpatrick, Veronen & Resick, *supra* note 9, at 662-65.

13. See, e.g., Kilpatrick, Veronen & Best, *supra* note 8, at 114-15, 136; Nadelson, Notman, Jackson & Gornick, *A Follow-Up Study of Rape Victims*, 139 AM. J. PSYCHIATRY 1266, 1266-67, 1269 (1982).

3. *Current Status of Rape Trauma Syndrome*

The Diagnostic and Statistical Manual of Mental Disorders ("DSM-III"),¹⁴ the American Psychiatric Association's authoritative reference, includes rape in the narrow category of stressors that cause Post-Traumatic Stress Disorder ("PTSD").¹⁵ The 1987 revision of this reference ("DSM-III(R)") points out that stressors known to produce PTSD would be markedly distressing to almost anyone, and usually create feelings of intense fear, terror, and helplessness.¹⁶ Symptoms of PTSD include reexperiencing the traumatic event,¹⁷ avoidance of stimuli associated with the event or numbing of general responsiveness,¹⁸ and increased arousal.¹⁹ In avoiding reminders of the trauma, the victim may experience amnesia with respect to some aspect of the event.²⁰

A number of the symptoms of PTSD parallel RTS symptoms. Like rape victims, those who suffer from PTSD often exhibit impulsive behavior, such as suddenly changing place of residence, unexplained absences, or other changes in lifestyle.²¹ The prominent feeling of self-blame observed in rape victims is also characteristic of PTSD, and may result in self-defeating behavior or suicidal actions.²²

14. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III]. A revised third edition, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. revised 1987) [hereinafter DSM-III(R)] was published in 1987.

15. DSM-III, *supra* note 14, at 236; DSM-III(R), *supra* note 14, at 248. The essential feature of PTSD is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience. The other stressors that cause PTSD are: Military combat; natural disasters such as floods and earthquakes; accidental disasters, including car accidents with serious physical injury, airplane crashes, large fires, and collapse of physical structures; and deliberately caused disasters such as bombing, torture, and death camps. The disorder is apparently more severe and longer lasting when the stressor is of human design. PTSD is not caused by such common experiences as simple bereavement, chronic illness, business losses, and marital conflict. DSM-III(R), *supra*, at 247-48.

16. DSM-III(R), *supra* note 14, at 247.

17. *Id.*

18. *Id.* Diminished responsiveness to external stimuli, also described as "psychic numbness" or "emotional anesthesia," usually begins shortly after the traumatic event. *Id.* at 248.

19. *Id.* Increased arousal is manifested by difficulty in sleeping, irritability, difficulty in concentrating, hypervigilance, exaggerated startle response, or physiological reactions to events that symbolize or resemble an aspect of the traumatic event (e.g., a woman who was raped in an elevator breaks out in a sweat when entering any elevator). *Id.* at 250.

20. *Id.* at 248.

21. *Id.* at 249.

22. *Id.*

Rape Trauma Syndrome

Studies specifically addressing rape victims verify that these women experience the symptoms of PTSD.²³ Within the framework of the PTSD symptomatology, researchers have observed a variety of behavioral patterns particularly characteristic of rape-induced trauma. For example, rape victims commonly delay reporting the incident,²⁴ and many experience some memory loss.²⁵

B. Judicial Treatment of Expert Testimony on Rape Trauma Syndrome

The Washington Supreme Court is one of very few courts which categorically reject expert testimony on RTS.²⁶ A few others admit the testimony readily, even allowing an expert to offer an opinion that the victim was raped.²⁷ Most courts, however, while admitting the

23. See, e.g., Burgess & Holmstrom, *Rape Trauma Syndrome and Post Traumatic Stress Response*, in *RAPE AND SEXUAL ASSAULT: A RESEARCH HANDBOOK* 49 (A. Burgess ed. 1985); Ellis, *supra* note 10, at 487; Kilpatrick, Veronen & Best, *supra* note 8, at 116-18; Nadelson, Notman, Zackson & Gornick, *supra* note 13, at 1269; Wilson, Smith & Johnson, *A Comparative Analysis of PTSD Among Various Survivor Groups*, in *TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF POST-TRAUMATIC STRESS DISORDER* 142, 167 (C. Figley ed. 1985) (finding that the level of PTSD symptoms exhibited by rape victims is second only to that of Vietnam combat veterans, despite a lack of statistical significance due to small sample size); see also Martin, Warfield & Braen, *Physician's Management of the Psychological Aspects of Rape*, 249 J. A.M.A. 501 (1983) (based on symptoms of PTSD, several physicians provided guidelines on how to lessen the psychological trauma experienced by a rape victim).

24. A rape victim often delays the report longer when she knows her assailant. See, e.g., S. KATZ & M. MAZUR, *UNDERSTANDING THE RAPE VICTIM* 188-90 (1979) (review of several studies indicated that a substantial number of women delay reporting rape, and that the closer the relationship between the victim and the attacker the longer the delay); Stewart, Hughes, Frank, Anderson, Kendall & West, *The Aftermath of Rape: Profiles of Immediate and Delayed Treatment Seekers*, 175 J. NERVOUS & MENTAL DISEASE 90, 92 (1987) (among a sample of highly distressed women who had been raped two months to over three years before requesting help, nearly 73% knew their assailants, as compared with only 50% of immediate treatment seekers). The feelings of intense fear and helplessness associated with PTSD may be exaggerated when the victim knows that her assailant could find her and retaliate if she reports the attack.

Delay in reporting may also be related to the "psychic numbness" or to the self-blame associated with PTSD. See *supra* note 18 ("psychic numbness"), and text accompanying note 22 (self-blame).

25. See, e.g., Horowitz, Wilner, Kaltreider & Alvarez, *Signs and Symptoms of Posttraumatic Stress Disorder*, 37 ARCHIVES GEN. PSYCHIATRY 85, 88 (1980) (memory failure is part of the denial syndrome of PTSD); Sutherland & Scherl, *supra* note 5, at 504 (during the acute reaction immediately following a rape, the victim is frequently unable to talk about the incident, or to describe the assailant); Veronen, Kilpatrick & Resick, *supra* note 10, at 156-57 (because rape victims can be expected to remember more as their anxiety lessens, it is inappropriate to impugn a victim's veracity based on the predictable changes in the information which she gives to police over time).

26. See *infra* notes 41-43.

27. See, e.g., *State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986); *State v. Liddell*, 685 P.2d 918 (Mont. 1984). In both of these cases, testimony that rape caused the Post-Traumatic Stress Syndrome observed in the victim was held admissible.

testimony, carefully limit it to avoid undue prejudice to the defendant. These courts do not allow the expert to give an opinion as to whether the victim is telling the truth. Rather, they limit the expert's testimony to providing general information about RTS, thus allowing the jury to more knowledgeably address the issues presented.

1. Testimony Admitted

a. Per Se Admissibility

Some courts find expert testimony on RTS relevant and admissible. These courts allow qualified experts to examine the alleged victim prior to trial, and to testify that the victim's emotional and psychological trauma is consistent with RTS.²⁸ They reason that such testimony does not invade the province of the jury, but carries the same weight as any other evidence.²⁹ Subjecting the expert to cross-examination provides defense counsel with the opportunity to point out deficiencies in the testimony and overcome its prejudicial effect.³⁰ The jury may then determine its weight.³¹ Such evidence can assist the jury in resolving the question of consent.³² These courts impose virtually no restrictions on admissibility of RTS testimony.

b. Jury Instructions Required

Courts may also provide jury instructions to safeguard against prejudice from the use of expert testimony.³³ The trial court instructs the jury to consider the expert's testimony along with whatever other evidence is submitted on the question of the alleged victim's credibility. One court noted that such testimony cannot invade the province of the

28. See, e.g., *State v. Huey*, 145 Ariz. 59, 699 P.2d 1290 (1985) (psychiatrist testified that the victim's mental state was consistent with her account of the rape); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982) (psychiatrist who examined the victim was allowed to testify that the victim was suffering from RTS); *State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986) (psychiatrist testified that the victim suffered from PTSD and that, in his opinion, the cause of the disorder was the rape complained of by the victim); *State v. Liddell*, 685 P.2d 918 (Mont. 1984) (psychiatric nurse was allowed to testify that the victim's acute depression and severe headaches were manifestations of a post-traumatic stress syndrome caused by rape).

29. See, e.g., *Huey*, 699 P.2d at 1294; *Marks*, 647 P.2d at 1299.

30. See, e.g., *Huey*, 699 P.2d at 1294; *Marks*, 647 P.2d at 1299; *Allewalt*, 517 A.2d at 751.

31. See, e.g., *Huey*, 699 P.2d at 1294; *Marks*, 647 P.2d at 1299; *Liddell*, 685 P.2d at 923.

32. See, e.g., *Huey*, 699 P.2d at 1294; *Liddell*, 685 P.2d at 923.

33. See, e.g., *Allewalt*, 517 A.2d at 751 (jury instructions can help to prevent any impression that the psychiatric opinion is like a "chemical reaction"); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984) (expert testimony on RTS was admissible, so long as adequate and proper jury instructions were provided).

jury unless the court instructs the jury that the expert's opinion is binding.³⁴

c. Expert's Testimony May Not Address Credibility of Alleged Rape Victim

Many courts allow testimony on RTS only if the expert does not comment on the credibility of the alleged victim.³⁵ An expert may testify only that the behavior of the alleged victim is consistent with a clinically observed pattern known as RTS, and may not offer an opinion as to whether the alleged victim is telling the truth. Rather, the expert's function is merely to explain the symptoms and behaviors described in the scientific literature on RTS, and to testify as to whether the victim exhibits these symptoms.³⁶

d. Expert May Only Testify to Explain Alleged Victim's Unusual Behavior

Some courts allow RTS testimony only to explain behavior of the alleged victim which could appear unusual or counterintuitive to a jury.³⁷ These courts allow the testimony to rebut an implication that certain behavior is inconsistent with a claim of nonconsensual sexual relations. Courts have admitted RTS testimony to provide a possible explanation for the victim delaying her report of the rape,³⁸ for mem-

34. *Commonwealth v. Gallagher*, 353 Pa. Super. 426, 510 A.2d 735, 742 n.7 (1986), *appeal granted*, 515 Pa. 574, 527 A.2d 535 (1987).

35. See, e.g., *Simmons v. State*, 504 N.E.2d 575, 579 (Ind. 1987) (testimony of two psychiatric social workers that the victim's behavior was consistent with clinically observed behavior patterns known among professionals as RTS was admissible, absent an opinion by the experts as to the credibility of the victim); *State v. Ogle*, 668 S.W.2d 138, 144 (Mo. App.) (absent testimony that the complaining witness suffered from RTS or an opinion from the physicians that the complaining witness was raped, testimony of two physicians with respect to psychological aftereffects on forcible rape victims was admissible), *cert. denied*, 469 U.S. 845 (1984); *Reid*, 475 N.Y.S.2d at 743 (expert testimony on RTS was admissible, but expert was not allowed to testify as to whether she believed the victim); *Gallagher*, 510 A.2d at 744 (testimony of an expert on RTS, which did not express an opinion about the victim's veracity, did not invade the province of the jury by impermissibly bolstering the victim's credibility).

36. *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984) (explicitly reaffirming *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982)).

37. See, e.g., *supra* notes 24 and 25 for description of such behavior.

38. See, e.g., *People v. Hampton*, 746 P.2d 947 (Colo. 1987) (expert testimony on RTS admitted where defense counsel indicated that victim's delay of 89 days in reporting the assault would be subject to serious attack at trial); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984) (expert testimony on RTS was allowed to explain 11-year-old victim's delay in reporting the rape, as well as her letters to the defendant recanting her accusations while the case awaited trial); see also *Delia S. v. Torres*, 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982) (civil case in which expert testimony indicated that feelings of fear, shame, and guilt, resulting in a failure to speak of or report the experience, are very common reactions for rape victims); *Scadden v. State*,

ory loss or faulty identification of the defendant,³⁹ or to rebut popular misconceptions concerning rape victims.⁴⁰

2. *Testimony Excluded*

Courts which, like the *Black* court, categorically exclude expert testimony on RTS are in the minority. These courts point to a few specific objections to the testimony. For example, some courts have found RTS testimony inadmissible because the expert gave an opinion about the victim's credibility,⁴¹ or because the testimony purported to establish conclusively that a rape had occurred.⁴² Even those courts which exclude the testimony frequently indicate that it would be admissible in a proper case.⁴³

732 P.2d 1036 (Wyo. 1987) (expert testimony was allowed to rebut the implication by the defendant that a delay in reporting was inconsistent with a claim of nonconsensual sexual relations).

39. See, e.g., *State v. Staples*, 120 N.H. 278, 415 A.2d 320 (1980) (physician who had examined the complainant within several hours of the alleged rape was allowed to testify that memory loss was not unusual in the case of rape victims); *Commonwealth v. Gallagher*, 353 Pa. Super. 426, 510 A.2d 735 (1986), *appeal granted*, 515 Pa. 574, 527 A.2d 535 (1987) (expert testimony on RTS was allowed to explain a psychological phenomenon beyond the knowledge and experience of the average juror, where the victim was unable to identify the assailant two weeks after the incident but identified him four years later).

40. While the Ninth Circuit has not addressed the issue of RTS directly, the court held in *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984), that expert testimony of a psychiatrist on PTSD was admissible to explain unusual behavior of two alleged victims of forced prostitution. Claiming consensual sexual relations, the defendant pointed out that the two alleged victims had failed to take advantage of opportunities to escape or call for help. Expert testimony on PTSD and the stages in forced prostitution leading to a feeling of complete helplessness was admissible under FED. R. EVID. 702.

41. See, e.g., *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982) (expert's opinion that the complaining witness had not fantasized the rape was reversible error).

42. See, e.g., *People v. Pullins*, 145 Mich. App. 414, 378 N.W.2d 502 (1985) (expert testimony on RTS was not admissible to prove that a rape in fact occurred, but the court explicitly reserved opinion on the admissibility of RTS evidence where consent is the defense); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (where there was no evidence that the expert was qualified to relate the specific incident that caused the victim's symptoms, the expert's conclusion that the complainant suffered from RTS as a result of the rape incident which she described went beyond the proper limits of opinion expression); see also *People v. Skinner*, 153 Mich. App. 815, 396 N.W.2d 548 (1986) (RTS evidence properly admitted where the expert made no claim that the characteristics of the victim established that she was raped); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982) (two dissenting justices emphasized that the expert in that case did not testify as to whether, in his opinion, the rape actually occurred).

43. For example, although the court in *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984), rejected expert testimony on RTS to prove that a rape occurred, the court cited approvingly cases allowing such testimony to rebut a defendant's suggestion that the victim's conduct was inconsistent with a claim of rape. The court noted that such testimony may play a particularly useful role by disabusing the jury of widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths. *Id.* at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457-58.

II. *STATE v. BLACK*

A. *Facts and Disposition*

In *State v. Black*,⁴⁴ the defendant's conviction of third-degree rape arose from an incident involving a sixteen year old girl who was a close family friend and neighbor. The defendant admitted to intercourse with the alleged victim, but asserted that it was consensual. The alleged victim maintained that the defendant forced her to have intercourse with him. Over the objection of defense counsel, the trial court admitted a rape crisis counselor's testimony that the complainant fit the profile of a rape victim.⁴⁵

The court of appeals reversed the conviction, concluding that there was insufficient foundation for admission of the RTS testimony.⁴⁶ The court found that the record failed to establish RTS as sufficiently reliable and accepted within the relevant scientific community.⁴⁷ The only bases for RTS testimony presented by the rape crisis counselor were that "every rape victim that [she had] seen" exhibited consistent symptoms,⁴⁸ and that she knew of one study that corroborated her observations.⁴⁹ The court of appeals explicitly declined to decide whether RTS evidence would be admissible under a properly laid foundation.

The Washington Supreme Court affirmed, remanding the case for a new trial without the RTS testimony.⁵⁰ It went one step further than the court of appeals, and held that expert testimony on RTS would be inadmissible under all circumstances.⁵¹

B. *Reasoning of the Court*

1. *The Majority Opinion*

The *Black* court found that expert testimony on the characteristics of RTS does not meet the requirements of Washington Rule of Evidence ("ER") 702, which governs the admissibility of expert testi-

44. 109 Wash. 2d 336, 745 P.2d 12 (1987).

45. *Id.* at 339, 745 P.2d at 14.

46. *State v. Black*, 46 Wash. App. 259, 730 P.2d 698 (1986), *aff'd*, 109 Wash. 2d 336, 745 P.2d 12 (1987).

47. *Id.* at 263, 730 P.2d at 701.

48. *Black*, 109 Wash. 2d at 339, 745 P.2d at 14.

49. The rape crisis counselor referred to the original Burgess & Holmstrom study on RTS, *supra* note 3. *Black*, 109 Wash. 2d at 339, 745 P.2d at 14.

50. *Id.* at 350, 745 P.2d at 19.

51. *Id.* at 338, 745 P.2d at 13.

mony.⁵² The Washington Supreme Court has interpreted this rule to require that the witness is qualified as an expert, the testimony is based upon an explanatory theory generally accepted in the scientific community, and the testimony is helpful to the trier of fact.⁵³

In applying ER 702 to the facts of the case before it,⁵⁴ the court noted that *Frye v. United States*⁵⁵ governs the admissibility of expert testimony based on new scientific theories.⁵⁶ Under *Frye*, the scientific principle underlying the testimony must be sufficiently established to have gained general acceptance in the relevant scientific community.⁵⁷ In determining whether RTS met the *Frye* standard, the court looked to the scientific literature on RTS. The court concluded that symptoms associated with RTS embrace such a broad spectrum of human behavior that the syndrome is a highly questionable means of identifying victims of rape.⁵⁸ The court also discussed the methodological shortcomings of studies defining RTS, finding that these shortcomings cast further doubt on whether RTS can prove reliably that an alleged victim was raped.⁵⁹

In comparing RTS evidence to fingerprints and blood tests, the court concluded that, unlike these other types of scientific evidence, RTS is not intended to be a fact-finding device.⁶⁰ The court reasoned that, because the origins of the RTS theory are in clinical therapy and therapists are trained to avoid judging the credibility of their clients, RTS testimony cannot be helpful in determining whether a woman

52. ER 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." WASH. R. EVID. 702. This rule is the same as FED. R. EVID. 702.

53. *State v. Allery*, 101 Wash. 2d 591, 596, 682 P.2d 312, 315 (1984). See generally K. TEGLAND, 5A WASHINGTON PRACTICE, EVIDENCE § 288, at 25 (2d ed. 1982) ("The admissibility of expert testimony under Rule 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact. . . . In addition, in a criminal case the court should consider whether the expert's opinion is based upon a generally accepted explanatory theory . . .").

54. Because the defendant did not challenge the expert's qualifications on appeal, the court addressed only the second and third parts of the three-part test under ER 702. *Black*, 109 Wash. 2d at 341, 745 P.2d at 15.

55. 293 F. 1013, 1014 (D.C. Cir. 1923).

56. *Black*, 109 Wash. 2d at 342, 745 P.2d at 15.

57. *Frye*, 293 F. at 1014.

58. *Black*, 109 Wash. 2d at 344, 745 P.2d at 16.

59. *Id.* at 345-46, 745 P.2d at 17.

60. *Id.* at 347, 745 P.2d at 18 (quoting *People v. Bledsoe*, 36 Cal. 3d 236, 249-50, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984)).

was raped.⁶¹ The court found that the general symptoms of RTS could result from any stressful sexual experience, not only rape.⁶²

Next, the court addressed another requirement for admissibility of expert testimony under ER 702: whether the testimony is helpful to the trier of fact. If the prejudicial effect of expert testimony outweighs its probative value, such testimony is inadmissible because it does not assist the trier of fact.⁶³ The court found the RTS testimony proffered in *Black* to be unfairly prejudicial because it constituted an opinion as to the guilt of the defendant, and therefore invaded the exclusive province of the jury.⁶⁴ The court also found that the term "rape trauma syndrome" was inherently prejudicial,⁶⁵ but it added that an expert's purposeful avoidance of the term does not render RTS testimony admissible.⁶⁶ Acknowledging that the prosecution may offer *lay* testimony concerning emotional or psychological trauma suffered by a complainant after an alleged rape, the court concluded that the reliability of RTS does not surpass the quality of "common sense evaluation present in jury deliberations."⁶⁷

2. *The Concurring Opinion*

Three justices concurred in the result,⁶⁸ noting that the prosecution failed to lay even a rudimentary foundation for the expert testimony, and that the expert did not appear to be qualified to testify on the subject matter.⁶⁹ However, these justices disagreed with the majority's approach of closing the door on admission of RTS expert testimony. They pointed out that, under some circumstances, a judge or jury may need assistance in understanding the evidence before the court.⁷⁰ The

61. *Id.*

62. *Id.* at 344, 745 P.2d at 16-17 (citing Notman & Nadelson, *supra* note 4, at 408; Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 VA. L. REV. 1657, 1696 (1984)).

63. *Black*, 109 Wash. 2d at 348, 745 P.2d at 18.

64. *Id.*

65. The court found that the term carries with it an implied opinion that the alleged victim is telling the truth, and that it constitutes a statement that the defendant is guilty of rape. *Id.* at 349, 745 P.2d at 19 (citing *State v. Taylor*, 663 S.W.2d 235, 241 (Mo. 1984)).

66. *Id.*

67. *Id.* at 350, 745 P.2d at 19 (quoting *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982)).

68. There was no dissenting opinion in *Black*.

69. *Black*, 109 Wash. 2d at 350, 745 P.2d at 19 (Utter, J., concurring in result). The majority did not consider the qualifications of the expert (the first prong of the test for admissibility of expert testimony under ER 702).

70. *Id.* at 350-51, 745 P.2d at 20. The concurring opinion noted this is especially true with rape, where the subject matter is strange, emotional, and burdened with historical assumptions and misapprehensions. *Id.* The concurring opinion went on to cite *State v. Rusk*, 289 Md. 230, 424 A.2d 720, 734 (1981), in which a dissenting justice argued that the complainant willingly

concurring justices agreed with the majority that RTS evidence should not be used to prove rape. They reserved judgment, however, in those cases where the defendant brings the mental state or behavior of the alleged victim into question to show that a rape could not have occurred.⁷¹ In such cases, the State should be permitted to rebut the defendant's theory with expert testimony showing that it is possible that a rape did occur.⁷² The concurring justices reasoned that this use of expert testimony does not invade the province of the finder of fact; rather, it gives the determination of the ultimate fact at issue back to the jury.⁷³ Noting the history of prejudice against rape victims manifested in the judicial system,⁷⁴ they concluded that the court should not deny juries the potential benefit of a body of knowledge accepted in many other jurisdictions.⁷⁵

III. ANALYSIS

RTS evidence meets the requirements of ER 702. The theory is generally accepted in the scientific community, and the testimony is helpful to the trier of fact. In assessing the acceptance of RTS by the relevant scientific community, the court ignored much of the recent literature which validates RTS as a description of common reactions to rape, and which confirms rape as a cause of PTSD. In determining whether RTS testimony is unfairly prejudicial to the defendant, the court looked to whether this testimony would be helpful to the jury. The court misread the description of PTSD in DSM-III, and mistakenly found that the stressors causing this disorder are within the average juror's experience. The court also mistakenly concluded that RTS may be caused by any sexually stressful experience. These errors led to the exclusion of RTS testimony in *Black*, an exclusion that is inconsistent with the Washington Supreme Court's acceptance of other

engaged in intercourse, although the defendant choked her, reasoning that because she had air enough to plead with him the choking was not serious enough to find a rape. *Black*, 109 Wash. 2d at 355, 745 P.2d at 22.

71. *Black*, 109 Wash. 2d at 351-52, 745 P.2d at 20 (Utter, J., concurring).

72. *Id.* at 352, 745 P.2d at 20.

73. *Id.*

74. *Id.* at 354-57, 745 P.2d at 21-23. The concurring opinion noted the formerly widespread requirement that a complainant's report of rape be corroborated by some independent source. The legislature eliminated this requirement in Washington. WASH. REV. CODE § 9A.44.020(1) (1987). The chastity of a rape complainant was formerly considered probative on the issue of credibility, leading to humiliating attacks by the defense on rape victims' reputations. The legislature remedied this with the "rape shield" statute. WASH. REV. CODE § 9A.44.020(2),(3) (1987).

75. *Black*, 109 Wash. 2d at 357, 745 P.2d at 23 (Utter, J., concurring).

expert psychological testimony to explain behavior that is outside the experience of the average juror.

A. *The Relevant Scientific Community Accepts Rape Trauma Syndrome*

1. *Recent Studies Support the Validity of Rape Trauma Syndrome*

Much of the relevant scientific literature is in conflict with the court's position that methodological weaknesses cast "grave doubt"⁷⁶ on the scientific reliability of RTS.⁷⁷ While the studies that the court cited in support of its position mentioned the shortcomings of prior studies, the purpose of the later studies was to remedy these shortcomings.⁷⁸ Many researchers note that current studies have adequately compensated for most of the deficiencies of the earlier clinical research.⁷⁹ These studies largely confirm the original description of RTS.⁸⁰

2. *The Therapeutic Origin of Rape Trauma Syndrome Does Not Diminish Its Validity*

The court concluded that because RTS was developed as a therapeutic tool, it is not scientifically reliable.⁸¹ However, studies validating RTS have been conducted in clinical research settings, using valid

76. *Black*, 109 Wash. 2d at 345, 745 P.2d at 17.

77. See *supra* notes 10–13.

78. See, e.g., Kilpatrick, Veronen & Resick, *supra* note 9, at 658–62 (1979) (cited by *Black*, 109 Wash. 2d at 345, 745 P.2d at 17). The introduction to this study pointed out that prior studies suffered from four severe methodological limitations: First, inadequate selection or description of the sample of victims; second, failure to include an appropriate comparison group of women who have not been raped; third, failure to use standardized, reliable instruments for measuring responses to rape; and fourth, inadequate description of crucially important aspects of study methodology. The study proceeded to specifically address, and correct, these faults.

79. See, e.g., Borgida, Frazier & Swim, *Prosecuting Sexual Assault: The Use of Expert Testimony on Rape Trauma Syndrome*, in PRACTICAL ASPECTS OF RAPE INVESTIGATION 347, 354–55 (1987) ("Current rape victim research is methodologically more sophisticated. These studies have compensated for most of the deficiencies in the earlier clinical research . . .").

80. See *supra* notes 10–13; see also Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 448 (1985) ("Over ten years have elapsed since the RTS theory was first advanced, research on rape victimology has mushroomed, yet no one writing on rape victimology seriously contests the RTS theory.").

81. *State v. Black*, 109 Wash. 2d 336, 347, 745 P.2d 12, 18 (1987) (quoting *People v. Bledsoe*, 36 Cal. 3d 236, 249–50, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984)) (because the function of rape counselors is to help their clients deal with the trauma they are experiencing, the historical accuracy of the clients' descriptions of the traumatizing event is not vital to their task).

Several researchers have recommended using RTS as a diagnostic tool, as well as for therapeutic purposes. See, e.g., A. BURGESS & L. HOLMSTROM, *RAPE: CRISIS AND RECOVERY* 449 (1979); Stewart, Hughes, Frank, Anderson, Kendall & West, *supra* note 24, at 94.

scientific research methodologies.⁸² Furthermore, this criticism assumes that false claims of rape are common. Statistics strongly suggest that the percentage of actual false reports in rape cases may be as low as or lower than most other crimes.⁸³ Finally, the Washington Supreme Court admits other types of expert psychological testimony, including testimony on battered woman syndrome and on sexually abused children,⁸⁴ that are based on theories with similar origins.⁸⁵

3. *The Scientific Community Agrees Rape Trauma Syndrome Evidence Should Be Admissible*

A recent survey of experts on rape and PTSD indicated consensus in the scientific community on the legal validity of RTS.⁸⁶ Two psychologists designed a questionnaire to address such issues as the admissibility of expert testimony on RTS, its helpfulness to jurors, and the scientific status of the current database on rape trauma.⁸⁷ Responses to these questions indicated support for the use of RTS evidence.⁸⁸

82. See *supra* notes 10–13; see also Horowitz, Wilner, Kaltreider & Alvarez, *supra* note 25, at 86 (“We provide data on a clinical population of persons with posttraumatic stress disorder, so defined by themselves and by clinicians through instruments and interviews designed with the intention of exploring the quality of these experiences.”).

83. See S. KATZ & M. MAZUR, *supra* note 24, at 207–13, for a review of the various indices of “unfounded” (i.e., false) reports of rape from around the United States. One study that excluded police bias due to the victim’s lack of cooperation and other behavior of the victim estimated that the actual frequency of false reports in rape cases was only 2%. *Id.* at 212; see also Massaro, *supra* note 80, at 452 n.238 (noting the “documented and marked tendency of women not to report ‘questionable’ rapes . . .”); Kilpatrick, Veronen & Best, *supra* note 8, at 116 (in one study, only 29% of the women who had been raped reported the incident to the police).

84. See, e.g., *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984) (battered woman syndrome); *State v. Petrich*, 101 Wash. 2d 566, 683 P.2d 173 (1984) (sexual abuse of children).

85. See, e.g., McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 19 n.114 (1986) (research on child sexual abuse is grounded in reports of the victims and on “anecdotal” studies of a small number of cases in minute detail); Recent Development, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV. 741, 742 (1982) (clinical psychologists’ theories on the psychological makeup of battered women are based on information gathered during interviews with battered women).

86. Frazier & Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 LAW & HUM. BEHAV. 101, 111–12 (1988). Based on a review of the literature, 22 experts who had conducted at least two empirical studies on rape were selected as respondents. *Id.* at 110. Although these people are not legal experts, they are commonly called upon to testify as experts in court, and are familiar with the judicial standards for acceptance of scientific evidence in their disciplines.

87. *Id.* at 106.

88. *Id.* at 111. The experts strongly agreed that the average juror is not so knowledgeable about rape that expert testimony would not be helpful, that expert psychological testimony on

B. Expert Testimony on Rape Trauma Syndrome Is Helpful to Jurors

1. The Stressors Causing Post-Traumatic Stress Disorder Are Outside the Range of Common Experience

In stating that symptoms of PTSD may be triggered by such common events as simple bereavement, chronic illness, and marital conflict,⁸⁹ the court misquoted DSM-III.⁹⁰ The relevant passage states instead that "[t]he stressor producing [PTSD] would evoke significant symptoms of distress in most people, and is generally outside the range of such common experiences as simple bereavement, chronic illness, business losses, or marital conflict."⁹¹ This misreading of DSM-III led to the court's conclusion that symptoms associated with RTS embrace a broad spectrum of human behavior, and that the syndrome therefore provides a highly questionable means of identifying rape victims.⁹² The nature of the other stressors known to cause PTSD, such as airplane crashes, large fires, torture, bombing, and death camps, belies this conclusion.⁹³ Just as average jurors are not likely to be familiar with common reactions to any of these events, neither are they likely to be familiar with a victim's reaction to rape.

2. Research on Rape Trauma Syndrome Distinguishes Rape From Other "Sexually Stressful Experiences"

The court further misconstrued scientific authority in concluding that RTS symptoms are not caused exclusively by rape, but may be caused by any "sexually stressful experience."⁹⁴ The sources that the

rape trauma should not be inadmissible because of concerns about its scientific reliability, and that RTS is an example of PTSD as defined in DSM-III. *Id.*

89. "Similar symptoms may be triggered by any psychologically traumatic event that is 'generally outside the range of usual human experience', including simple bereavement, chronic illness, [and] marital conflict" *State v. Black*, 109 Wash. 2d 336, 344, 745 P.2d 12, 16 (1987).

90. *See supra* note 14.

91. DSM-III, *supra* note 14, at 236. The parallel section of DSM-III(R) states that "[t]he essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience (i.e., outside the range of such common experiences as simple bereavement, chronic illness, business losses, and marital conflict)." DSM-III(R), *supra* note 14, at 247. The court also lists "automobile accidents" as a cause of PTSD, *Black*, 109 Wash. 2d at 344, 745 P.2d at 16, while both medical authorities cite this stressor as "car accidents with serious physical injury." DSM-III, *supra*, at 236; DSM-III(R), *supra*, at 248.

92. *Black*, 109 Wash. 2d at 344, 745 P.2d at 16.

93. *See supra* note 15.

94. *Black*, 109 Wash. 2d at 344-45, 745 P.2d at 16-17.

court cited in support of this conclusion⁹⁵ refer to the Burgess and Holmstrom study on RTS.⁹⁶ The authors of the two studies cited by the court mistakenly stated that Burgess and Holmstrom included victims of sexual experiences that were merely stressful in the sample group of women upon which they based the RTS theory. Burgess and Holmstrom, however, derived their theory on rape trauma from analysis of the symptoms of *only* those women who were victims of forcible rape.⁹⁷

3. *Testimony on Rape Trauma Syndrome Is Not Unfairly Prejudicial Because It Does Not Comment Directly on the Guilt or Innocence of the Defendant*

Use of RTS testimony to explain behavior of the alleged victim which may initially appear unusual or counterintuitive to a jury does not make a direct statement about the guilt or innocence of the defendant.⁹⁸ Once the defendant "opens the door" by questioning some behavior of the alleged victim which could appear to the average juror to be inconsistent with a claim of rape, expert testimony could help the jury to properly interpret this behavior. Washington courts allow such rehabilitative use of expert testimony.⁹⁹

Washington courts generally exclude testimony which assumes that, because the defendant is a member of a recognizable class of people, the defendant is statistically more likely to have committed a particular crime.¹⁰⁰ Properly used, RTS testimony does not speculate on the statistical likelihood that the victim was raped.¹⁰¹ Researchers do not

95. Notman & Nadelson, *supra* note 4, at 408; Note, *supra* note 62, at 1696.

96. Burgess & Holmstrom, *supra* note 3. This was the study that first described RTS.

97. *Id.* at 981. The researchers divided the 146 patients admitted to the emergency ward with a complaint of rape into three categories: First, victims of forcible rape; second, victims in situations to which they were an accessory due to their inability to consent; and third, victims of sexually stressful situations. "The rape trauma syndrome delineated in this paper was derived from an analysis of the symptoms of the 92 adult women in our sample who were victims of forcible rape." *Id.*

98. See *State v. McGee*, 324 N.W.2d 232, 234 (Minn. 1982) (Wahl, J., dissenting) ("[R]ape trauma evidence is victim-oriented, explains victim injuries and is nonprejudicial to the character of the defendant.").

99. See, e.g., *State v. Petrich*, 101 Wash. 2d 566, 575, 683 P.2d 173, 180 (1984) ("Once a witness's credibility is in issue, evidence tending to corroborate the testimony may, in the trial court's discretion, be obtained from an expert witness.").

100. See, e.g., *id.* at 576, 683 P.2d at 180 (expert testimony that invites the jury to conclude that, because the defendant knew the victim, he is statistically more likely to have sexually abused her, should be excluded on retrial).

101. Improperly used, RTS testimony could invite the jury to conclude that, because the victim exhibits the characteristics associated with RTS, she was raped. This would be highly prejudicial to the defendant, since most cases in which RTS testimony is offered involve no

even make the claim that there is a "typical" rape victim.¹⁰² However, commonly recognized reactions to rape are sufficiently specific that they comprise a medically accepted symptomatology.¹⁰³ When used to explain reactions to a given stressor after these same reactions have already been observed in the alleged victim, the testimony merely points out to a jury that certain behavior is not inconsistent with a claim of rape.¹⁰⁴

4. *The Court Admits Similar Psychological Testimony*

Properly used, expert testimony on RTS accords with Washington Supreme Court precedent allowing expert psychological testimony to explain behavior that is outside the common experience and understanding of the average juror.¹⁰⁵ For example, courts admit expert

question as to the identity of the defendant. The issue is usually consent. Such improper use of RTS testimony would invite the jury to conclude from the expert testimony that the defendant is guilty.

102. See, e.g., Borgida, Frazier & Swim, *supra* note 79, at 357 (the existence of individual variability does not suggest that evidence regarding common rape victim reactions, which at this time are well documented, is not helpful to jurors faced with making a determination regarding consent); Kilpatrick, Veronen & Best, *supra* note 8, at 120–21 (because rape victims bring to the experience significant differences in biographic and demographic characteristics, it is not unreasonable to assume that the psychological distress produced by a rape might vary as a function of the victim's characteristics and the nature of the rape itself).

103. DSM-III, *supra* note 14, at 236–39; DSM-III(R), *supra* note 14, at 247–51.

104. The court emphasized the proper use of expert psychological testimony on battered woman syndrome in *State v. Kelly*, 102 Wash. 2d 188, 685 P.2d 564 (1984). This case also illustrates the proper use of RTS testimony. The defendant admitted killing her husband, but asserted she acted in self-defense. Relying on *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984), the court pointed out that the defendant did not introduce expert testimony to show that, in shooting her husband, she acted in conformity with behavioral characteristics said to comprise battered woman syndrome. Rather, she offered the testimony to aid the jury in understanding the reasonableness of her fear of her husband. In this context, the court noted, testimony on battered woman syndrome was not offered as evidence of a pertinent character trait, but rather to aid the trier of fact in understanding the evidence and determining a fact in issue, self-defense. *Kelly*, 102 Wash. 2d at 195–96, 685 P.2d at 570.

RTS testimony could be admitted when offered for similar reasons. Properly used, it can aid the jury in determining a fact in issue, such as whether certain behavior is consistent with a claim of rape.

105. See, e.g., *Allery*, 101 Wash. 2d at 597, 682 P.2d at 316 (expert testimony, explaining why a person suffering from the battered woman syndrome would fear increased aggression by her mate but still not leave him or inform police or friends, is helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person); *State v. Petrich*, 101 Wash. 2d 566, 575–76, 683 P.2d 173, 180 (1984) (expert testimony, explaining that delay in reporting sexual abuse is not unusual, is admissible where evidence suggests conduct from which the jury could have inferred a behavioral response inconsistent with the witness's testimony).

The use of expert testimony on RTS can be limited to avoid the inference that, because the alleged victim exhibits symptoms characteristic of RTS, the defendant raped her. See *State v. Kelly*, 102 Wash. 2d 188, 685 P.2d 564 (1984) (expert testimony on battered woman syndrome held admissible where the defendant offered the testimony to aid the jury in understanding the

testimony on battered woman syndrome¹⁰⁶ to explain why the defendant stayed with her mate long after the point when most jurors would assume that a reasonable person would have left.¹⁰⁷ Without such testimony, the jury might assume that the defendant's assertion that she acted in self-defense was simply a post hoc rationalization for attacking her mate. In *State v. Allery*,¹⁰⁸ the court held expert testimony admissible to explain why the defendant feared for her safety at the time she shot her husband, although he was lying on the couch and did not have a weapon.¹⁰⁹ The record showed that, had the trial court admitted the testimony, the expert on sexual assault would have related her professional analysis of the behavioral and emotional patterns exhibited by women who suffer from repeated physical abuse by husbands or lovers.¹¹⁰

The proper use of RTS testimony would be similar to this use of testimony on battered woman syndrome.¹¹¹ Victims of rape often

reasonableness of her apprehension of imminent death or bodily injury, not to show that at the time she shot her husband she was acting in conformity with behavioral characteristics said to comprise the syndrome).

106. "A battered woman is a woman who is repeatedly subjected to any forceful physical and psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights." L. WALKER, *THE BATTERED WOMAN* xv (1979).

107. Researchers have found that repeated batterings destroy the battered woman's volition, resulting in "learned helplessness." She comes to believe that nothing she can do will alter the situation, and does not try to escape from the relationship. Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348, 351 (1982) (citing L. WALKER, *supra* note 106, at 49-50).

108. 101 Wash. 2d 591, 682 P.2d 312 (1984). In *Allery*, the founder of a sexual assault unit at a hospital testified that battered woman syndrome is recognized by the psychiatric profession, and is defined as a technical term of art in professional diagnostic textbooks. *Id.* at 596, 682 P.2d at 315. Citing generally to two law review articles on the subject and to several jurisdictions which admit this testimony, the court held expert testimony on battered woman syndrome admissible. *Id.* at 597, 682 P.2d at 316.

109. *Allery*, 101 Wash. 2d at 597, 682 P.2d at 316. Immediately after a serious threat from her husband, the defendant tried unsuccessfully to escape through a bedroom window. Hearing a noise from the kitchen, she thought her husband was getting a knife. She then loaded a shotgun, moved to the kitchen area, and shot her husband while he remained lying on the couch. *Id.* at 593, 682 P.2d at 313-14.

110. *Id.* at 595, 682 P.2d at 315. The record also showed that, in the testimony held admissible by the Washington Supreme Court in *Allery*, the expert would have opined that the defendant displayed the behavioral and emotional characteristics of a battered woman. *Id.* This use of the testimony goes beyond the proposed use of RTS evidence, which would exclude expert testimony that the alleged victim displays RTS symptoms. See *infra* text accompanying notes 126-29.

111. Arguably, battered woman syndrome and RTS are not strictly analogous. Generally, the defendant offers expert testimony on battered woman syndrome, while the complainant (victim) offers expert testimony on RTS. However, in *State v. Ciskie*, 110 Wash. 2d 263, 278-79, 751 P.2d 1165, 1173 (1988), the court held expert testimony on battered woman syndrome admissible to assist the jury in understanding the victim's delay in reporting the alleged rape. The court recognized that "[a]t the heart of this issue is the question of whether we will extend

exhibit reactions that would appear unreasonable to jurors, such as delay in reporting the incident, an inability to consistently identify the defendant, or a calm demeanor.¹¹² RTS testimony helps to demystify this behavior, just as expert testimony on battered woman syndrome does in another context.

RTS testimony also parallels expert testimony on the behavior of children who have been sexually abused. Child victims of sexual abuse commonly display behavior similar to that observed in adult victims of rape.¹¹³ The court admits testimony about behavior of child abuse victims where the child's behavior appears inconsistent with the claim of sexual abuse.¹¹⁴ Once the witness's credibility is in issue, an expert may restore that credibility by giving the jury information which will help them to understand the evidence.¹¹⁵ Similarly, when the behavior of a rape victim would lead the jury to doubt her credibility, the court should allow an expert to explain that the victim's behavior is not necessarily inconsistent with a claim of rape. The jury may then better understand reactions to a situation which is outside their common experience.

IV. PROPOSED SOLUTION

Expert testimony on RTS should be admitted under the *Frye* test, based on the strong evidence of acceptance in the relevant scientific community. A synthesis of the evidentiary concerns expressed in ER 702, ER 703, and ER 403, however, would provide the court with a

the benefit of concepts this court has applied to defendants charged with a crime to those who are victims of a crime." *Id.* at 265, 751 P.2d at 1166. The court concluded that "[n]either logic nor law requires us to deny victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror's understanding." *Id.*

112. See *supra* notes 5, 24, 25, and accompanying text.

113. For example, as in rape cases, delay in reporting is very common in child sexual abuse cases, and longer delay is correlated with the victim's acquaintance with the perpetrator of the abuse. See, e.g., *State v. Petrich*, 101 Wash. 2d 566, 569, 683 P.2d 173, 176 (1984) (expert testimony that a delay in reporting was found in over 50% of sexual abuse cases involving child victims, and that longer delay was associated with cases where the child knew the perpetrator, was admissible); *State v. Clafin*, 38 Wash. App. 847, 852, 690 P.2d 1186, 1190 (1984) (admission of expert opinion that delay in reporting is not unusual among sexually abused children, and that length of delay is correlated with the relationship between the abuser and the child, was not an abuse of the trial court's discretion).

Fear of reprisal and fear that the victim will not be believed motivate delay in both rape and child sexual abuse cases. See, e.g., *Petrich*, 101 Wash. 2d at 568, 683 P.2d at 176 (child victim of sexual abuse feared she would not be believed if she told anyone); *Scadden v. State*, 732 P.2d 1036, 1045 (Wyo. 1987) (fear may be instilled by the perpetrator who has threatened to harm the child, and the biggest fear that sexually abused children have is that they will not be believed).

114. See *supra* note 113.

115. *Petrich*, 101 Wash. 2d at 575, 683 P.2d at 180.

more appropriate test than *Frye* for determining the admissibility of psychological evidence.¹¹⁶ The *Frye* test was developed to shield jurors from a tendency to treat novel scientific evidence as infallible.¹¹⁷ The average juror may well be unable to evaluate the reliability of a new and highly technical scientific device or process.¹¹⁸ However, the same juror can comprehend psychological theories and clinical research methods when these are explained by a qualified expert.¹¹⁹ Studies indicate that the testimony of mental health experts does not

116. The Washington Rules of Evidence do not mention the *Frye* test. If the important policies promoted by the test are reliability and avoidance of undue prejudice, ER 702 (requiring that scientific or technical knowledge will assist the trier of fact), ER 703 (requiring that the facts or data upon which the expert bases an opinion be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject), and ER 403 (providing for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence) are sufficient. R. ARONSON, *THE LAW OF EVIDENCE IN WASHINGTON* VII-14 (1987).

Over the last decade, the *Frye* test has been subjected to considerable criticism. See generally Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980) (rather than using *Frye* as an analytical tool to decide whether novel scientific evidence should be admitted, many courts apply it as a label to justify their own views about the reliability of particular forensic techniques); McCormick, *Scientific Evidence: Defining a New Approach To Admissibility*, 67 IOWA L. REV. 879 (1982) (admissibility of scientific evidence can best be determined within the procedural framework of traditional relevancy and expert testimony analysis exemplified in Federal Rules of Evidence 401, 403, and 702). Some jurisdictions have expressly rejected the test, reasoning that the admissibility of scientific evidence is better regulated by the doctrines of relevancy and helpfulness to the finder of fact. MCCORMICK ON EVIDENCE 607 (E. Cleary 3d ed. 1984). Some courts find that the test places too much emphasis on the amount of acceptance necessary before scientific principles or technology may be admitted. See, e.g., *State v. Williams*, 4 Ohio St. 3d 53, 446 N.E.2d 444, 447-48 (1983) ("scientific nose-counting" not required for voice spectrogram to be admissible).

117. The testimony in *Frye* concerned results of a systolic blood pressure test (a forerunner of the modern polygraph test). *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

118. Thus, the rigid standard of the *Frye* test may be appropriate when confronting jurors with evidence based on such technological advances as radar speed meters, gas chromatography/mass spectrometry (a highly accurate method of urinalysis drug testing), etc.

119. See, e.g., Imwinkelried, *The Standard For Admitting Scientific Evidence: A Critique From the Perspective of Juror Psychology*, 28 VILL. L. REV. 554, 567-69 (1982-83) (jurors are capable of weighing and evaluating psychiatric testimony); see also Loftus & Monahan, *Trial by Data*, 35 AM. PSYCHOLOGIST 270 (1980) (because the psychologist is not often testifying about "magical devices" but rather is discussing research on human behavior, the statements more properly belong in the category of medical testimony to which the general acceptance standard has not usually been applied).

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overawe jurors.¹²⁰ In addition, the defendant may always cross-examine such experts to aid the jury in evaluating this testimony.¹²¹

Regardless of whether the court evaluates RTS evidence under the *Frye* test or under an alternative standard, certain procedural safeguards could minimize the possibility of unfair prejudice to the defendant.

A. The Court Could Require a Pretrial Offer of Proof on the Relevance of Rape Trauma Syndrome Testimony

The judge could weigh the probative value of RTS testimony against its potential prejudicial effect, as set out in ER 403, to ensure that the testimony would be more helpful than prejudicial.¹²² A detailed pre-trial offer of proof must show an appropriate “fit” between the proposed expert testimony and the facts of the case at hand.¹²³ Where the expert testimony clearly relates to the facts of the case, it has greater

120. See, e.g., Imwinkelried, *supra* note 119, at 569 (on the contrary, psychiatry has received “extensive adverse publicity,” especially since the 1982 trial of John Hinckley, Jr., thus making it even less likely that jurors will be overawed by this type of evidence); see also H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 177 n.12 (Midway Reprint ed. 1986) (acquittal differential between judge and jury remains roughly constant from cases with expert witnesses to those in which this factor was absent); R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 169–70 (1967) (jury is too impressed with its importance as an institution and with its responsibility to the court and the community to relinquish its decision-making power to an expert); Massaro, *supra* note 80, at 444 (adherents cite no data supporting the assumption that jurors are overawed by mental health experts).

121. See, e.g., Massaro, *supra* note 80, at 446–47 (regardless of whether jurors give undue weight to such things as polygraph results, the same is not true with regard to expert psychological testimony because such testimony does not involve a mechanical device impervious to effective cross-examination).

122. “Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . .” WASH. R. EVID. 104(a).

ER 403 provides guidelines for determining admissibility of evidence. WASH. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .”).

123. See, e.g., *State v. Moon*, 45 Wash. App. 692, 699, 726 P.2d 1263, 1267 (1986) (where the witness had a short, stressful view of the offender and was subject to “postevent information” in the form of a photo montage and a lineup, expert testimony regarding the effects of stress and “postevent information” on the reliability of eyewitness identification was improperly excluded).

Even in a situation where there are strong policy reasons for excluding a particular type of evidence, the legislature provided for admission of the evidence where it is highly relevant to a particular case. Washington’s “rape shield” statute, WASH. REV. CODE § 9A.44.020(2),(3) (1987), provides that evidence of a rape victim’s past sexual behavior is not admissible to attack the credibility of the victim. However, if factual similarities can be demonstrated between prior consensual sex acts and the questioned sex acts which the defendant claims were consensual, evidence of past sexual behavior is admissible. *State v. Hudlow*, 99 Wash. 2d 1, 11, 659 P.2d 514, 520 (1983). Similarly, where the witness in a rape case delays reporting the incident, or gives conflicting accounts at various times, an expert should be allowed to explain reasons for this conduct which are nevertheless consistent with a claim of rape.

probative value. With appropriate safeguards,¹²⁴ the judge could then admit the testimony.¹²⁵

B. The Expert Would Not Interview the Victim

The court could limit RTS testimony to description and explanation of the reactions of rape victims generally.¹²⁶ Such generalized expert testimony about behaviors common to a class, rather than an evaluation of the actions of an individual complainant, is the proper format for this testimony. The expert would not be permitted to interview the victim, and so could not testify as to her credibility.¹²⁷ RTS testimony would simply provide a general context in which the jury could more knowledgeably address the issues. Used in this manner, RTS testimony tends only to show that the victim's behavior is consistent with RTS; it implies nothing about whether the victim suffers from RTS or whether she has been raped.

C. The Court Could Instruct the Jury on the Weight of Expert Testimony

An expert can never usurp the jury's duty of finding facts because the jury can accept or reject the expert's evidence or opinion.¹²⁸ Nevertheless, the court can take steps to guard against any possibility that the jury will give up its fact-finding function to an expert. The court could explicitly instruct the jury that the expert's testimony does not dispose of credibility issues, and that the jury must weigh the expert testimony as it would any other evidence. All credibility determinations would therefore remain with the jury.

124. See *infra* text accompanying notes 126-29.

125. The balancing test contemplated by ER 403 is left to the discretion of the trial court. This decision will be overturned only for abuse of discretion. *State v. Guloy*, 104 Wash. 2d 412, 421, 705 P.2d 1182, 1189 (1985), *cert. denied*, 475 U.S. 1020 (1986).

126. See, e.g., *People v. Hampton*, 746 P.2d 947, 951 (Colo. 1987) (the expert's testimony was limited to the reactions of rape victims generally; she did not interview or contact the victim, did not testify that the victim suffered from RTS or that the victim had been raped, and expressed no opinion as to the truthfulness of the victim).

127. See, e.g., *id.*; see also *State v. Allewalt*, 308 Md. 89, 517 A.2d 741, 761 (1986) (McAuliffe, J., concurring) (while expert testimony on PTSD is admissible in rape prosecutions, the expert should not be allowed to express an opinion that the complainant in a particular case suffered from PTSD, nor should the expert be allowed to identify the particular trauma that precipitated the condition).

128. *Group Health Coop. v. Department of Revenue*, 106 Wash. 2d 391, 399, 722 P.2d 787, 791 (1986).

D. The Court Could Designate the Syndrome Using the Correct Medical Term

The psychiatric community recognizes rape as a stressor which causes PTSD. DSM-III does not mention the term "rape trauma syndrome." Use of the term "post-traumatic stress disorder" rather than "rape trauma syndrome" reduces the potential prejudice of the testimony.¹²⁹ The jury does not perceive the expert as offering an opinion that the victim was raped, but rather an explanation of behaviors that result from stressors of a certain magnitude.

V. CONCLUSION

In the case of *State v. Black*, the court properly excluded the testimony on rape trauma syndrome. The State laid no foundation for the testimony, and the expert was arguably not qualified to present it. The court, however, was not compelled to decide that expert testimony on rape trauma syndrome would be inadmissible in all rape trials. That decision was based not on the facts of *Black*, but on a misinterpretation of the scientific literature, and on the erroneous belief that testimony on rape trauma syndrome is always unfairly prejudicial to the defendant.

Available information indicates overwhelming acceptance of rape trauma syndrome as a valid description of common reactions to an extreme trauma such as that caused by rape. Proper use of the procedural tools of our judicial system could minimize the danger of unfair prejudice to the defendant. Where behavior of a rape victim could lead a jury to infer consent to sexual intercourse, the court should allow expert testimony on rape trauma syndrome to aid the jury in evaluating reactions to an event that is beyond our common experience.

In other contexts, the Washington Supreme Court has demonstrated its sensitivity to a "long and unfortunate history of sex discrimination."¹³⁰ Assumptions about "normal" reactions to rape are part of this history. The court's blanket exclusion of expert testimony on rape

129. See *Allewalt*, 517 A.2d at 751. Although the *Black* court found the distinction merely a semantic one, *State v. Black*, 109 Wash. 2d 336, 349, 745 P.2d 12, 19 (1987), credibility requires that the medically accepted term be used.

130. *State v. Wanrow*, 88 Wash. 2d 221, 240, 559 P.2d 548, 559 (1977) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)) (until the effects of such discrimination are eradicated, care must be taken to assure that self-defense instructions afford women the right to have their conduct judged in light of the physical handicaps which are the product of sex discrimination).

trauma syndrome ensures that remnants of this discrimination against women will continue to survive in Washington courts.

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